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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-207601

DATE: February 9, 1983

MATTER OF: Modutech Marine, Inc.

DIGEST:

1. Protest filed after bid opening is timely where protester challenges the validity of a responsiveness evaluation under allegedly defective specifications.
2. Even if IFB requirement for descriptive literature is stated improperly, procuring activity may properly reject bid with descriptive literature that takes exception to purchase description.
3. Protester's blanket statement that it would comply with specifications and letter of clarification after bid opening cannot cure defect created by nonconforming descriptive literature, since bidder's intent to comply with the specifications must be determined at bid opening from face of bid.

Modutech Marine, Inc. (Modutech), protests the award of a contract to Uniflite, Inc. (Uniflite), for a requirement of patrol boats under invitation for bids (IFB) No. DAAD05-82-B-0253 issued by the United States Army Test and Evaluation Command (TECOM), Aberdeen Proving Ground, Maryland. Modutech contends that TECOM improperly rejected its bid as nonresponsive. Alternatively, Modutech argues that if its bid was properly rejected for failing to comply with the specifications, then Uniflite's bid also should have been rejected for the same reason because Uniflite has allegedly failed to comply with identical specifications under a 1981 contract. Modutech also suggests that the Army's alleged acceptance of nonconforming Uniflite boats shows that the Army should regard the deficiencies in Modutech's bid to be "trivial."

We deny the protest.

On March 1, 1982, TECOM issued an IFB for the purchase of two high speed patrol boats, with an option to increase

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the quantity by one additional boat. The IFB contained a paragraph requiring bidders to submit descriptive literature. After bid opening on March 31, 1982, even though Modutech was the lowest bidder, the technical evaluator recommended rejecting the bid because the descriptive literature materially deviated from the specifications. Based on the negative evaluation, TECOM made award to Uniflite, the next lowest bidder.

Modutech contends that TECOM should be precluded from rejecting its bid because the IFB's descriptive literature clause allegedly failed to specify necessary details as to the purpose for which the literature was required. Modutech asserts that the absence of clear directions prevented it from adequately responding to the literature requirement. TECOM, however, contends that the allegation involves an apparent solicitation defect which should have been made the subject of a protest prior to bid opening to be considered timely. In our view, the gravamen of the protest addresses the evaluation of the bid as nonresponsive; therefore, we consider the protest to be timely on that basis.

Assuming, for the purpose of discussion, that the IFB was defective for failing to spell out, with particularity, the descriptive literature requirement, Modutech's bid nevertheless, may be properly rejected if the literature which accompanied it showed that the item would not conform to a stated requirement of the purchase description. Blazer Industries, Inc., B-194188, June 19, 1979, 79-1 CPD 440; 46 Comp. Gen. 315 (1966).

The drawings Modutech submitted as a part of the bid indicated to the Army that the boats it proposed to build would not conform to paragraph 3.3 of the purchase description, which provides:

"3.3 Principal Characteristics:

- "e. Speed (Max., Not Less Than) * * *
Fully Equipped 38 MPH
- "f. Draft (Max.) * * * 42 inches"

As stated by the Army's evaluator:

"The purchase description required a maximum draft of 42 inches. [Modutech's drawing] shows the draft to be 48 inches which exceeds the requirement by six inches.

This is unacceptable since the [Army's] boat must be capable of operating in shallow water. The water depth in channel leading from the * * * boat dock is no more than 48 inches in several locations at low water. A 48 inch draft boat would preclude operating in and out of the channel during low water.

"The purchase description requires a maximum speed (fully equipped) of not less than 38 MPH. It is estimated that the GMC 6V92TA engines shown [on Modutech's drawing] will produce approximately 500 [Shaft Horsepower] at maximum RPM's of 2100. From experience it is doubtful that they can produce the speed for the size and weight of the boat specified."

Modutech contests the Army's technical evaluation with respect to the speed requirement by arguing that the evaluation is "speculative [and] erroneous." Modutech does not dispute, however, the evaluator's finding concerning its boat's draft measurement which--based on the drawing submitted with its bid--exceeds the maximum draft measurement by 6 inches. But Modutech states that Uniflite's bid should also have been rejected--although nothing in Uniflite's bid indicated any deviation from the stated 42-inch draft maximum--because of Uniflite's possible nonconformity to an identical specification under a 1981 contract; alternatively, Modutech argues that Uniflite's possible nonconformity--which the Army has allegedly acquiesced in--shows that the Army actually considers deviations from the draft measurement specification to be "trivial." Although Modutech suggests that Uniflite's draft measurement exceeds the specification, Modutech admits that it is not sure "whether * * * the Uniflite vessels met the draft requirement."

In reply to Modutech's allegation regarding the draft measurement of Uniflite's boats, the Army states:

"With respect to Uniflite's previous contract, it should be understood that [the Army] has not accepted nor fully paid for the boats delivered by Uniflite on the 1981 contract due to some minor deficiencies in the boats. [We are] satisfied that with some additional work by Uniflite, which is presently being accomplished at no cost * * *,

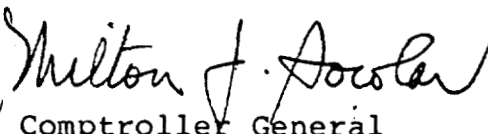
these boats will meet all critical elements of the specification. [We are] not going to accept from Uniflite, under either contract, boats which fail to meet the specifications contained in the respective contracts."

Given the Army's position, and Modutech's uncertainty, we cannot conclude that the Army, in fact, regards deviations from the maximum draft measurement as trivial.

As to whether Uniflite will, in fact, build boats conforming to the specifications, this question is a matter of contract administration, a function and responsibility of the procuring activity, not GAO. See Welch Allyn, B-206193.2, March 2, 1982, 82-1 CPD 187.

Finally, neither Modutech's blanket statement in its bid that it would comply with the specifications, nor its April 6 letter, which informed the Army that it would modify its boat to meet the draft requirement, can cure the defect created by the descriptive literature. It is well-established that a blanket offer to conform does not cure a deviation from the specifications (IFR, Inc., B-203391.4, April 1, 1982, 82-1 CPD 292); moreover, a bidder's intention to comply with the specifications must be determined from the face of the bid itself without resort to explanations furnished after bid opening.

We deny the protest.

for 
Comptroller General
of the United States